HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

C.P.M/S No. 506/2005

Suresh Kumar
Vs
Stated Uttaranchal & others

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 25.4.2006

Initial of Judge

IN THE HON'BLE HIGH COURT OF UTTARANCHAL

AT NAINITAL

CIVIL PETITION NO. 506 (MS) OF 2005

Suresh Kumar, S/o Sri Paltu Ram, R/o Village Shantarshah, P.O. Daulatpur, District Haridwar. .....Petitioner

Versus

1. State of Uttaranchal, through its Secretary, Ministry of Labour, Civil Secretariat, Dehradun.
2. Additional Labour Commissioner, Dehradun.
3. Assistant Labour Commissioner, Haridwar.
4. Irrigation Research Institute, Roorkee, Haridwar, through its Research Officer (Division).
5. Irrigation Research Institute, Roorkee, Haridwar, through its Superintending Engineer. .....Respondents.

25.04.2006

Sri Pankaj Miglani, learned counsel for the petitioner.
Learned Standing Counsel.

Hon'ble Rajesh Tandon, J.

Heard Sri Pankaj Miglani, learned counsel for the petitioner and learned Standing Counsel.

By the present writ petition the petitioner has prayed to summon the complete record pertaining to the case and issue the order setting aside the impugned order i.e. order dated 07.02.2003 passed by the respondent no. 2 contained in Annexure 3 to the petition and to issue a writ of certiorari quashing the impugned orders dated 05.07.2004 passed by the respondent no.3 (Annexure 3 to the writ petition). Further prayer has been made for a writ of mandamus directing the respondents no. 3 and 2 to consider the dispute and refer the same to the labour court for its adjudication.

Briefly stated, the petitioner has been working as Beldar on muster roll since 02.04.1980 till 01.04.1983 regularly. On

02.04.1983 he was stopped from doing work with respondent no.4 and his services were illegally retrenched without following the procedure as has been prescribed under Section 6(N) of U.P. Industrial Disputes Act, 1947.

On 14.06.2001, the petitioner made an application to the Conciliation Officer under Section 2-A of the U.P. Industrial Disputes Act along with the application for condonation of delay and the case was registered as C.P./D.C. Case No. 29 of 2001.

Thereafter, the Conciliation Officer has sent a notice to both the parties directing them to file their written statement and to present in his office.

In compliance with the order of Conciliation Officer, respondent no. 4 appeared before him and filed its objections and in the objections, respondent no. 4 alleged that the matter is barred by time and there is huge delay and has been raised after a lapse of 18 years. It was alleged that the petitioner has not worked for more than 240 days of any calendar year.

Parties were heard and on 07.02.2003 and respondent no. 3 passed an order rejecting the application of the petitioner.

Thereafter on 03.05.2004, the petitioner again moved an application under Section 2-A of the U.P. Industrial Disputes Act. This application was registered as C.P.C.D. Case No. 48 of 2004. On 05.07.2004, respondent no. 3 rejected the application of the petitioner.

It has been submitted by the petitioner that the order dated 07.02.2003 and 05.07.2004 passed by the respondent no. 3 is illegal as the matter of delay does not bar the jurisdiction of Labour Court and provisions of Article 137 of the Indian Limitation Act are not applicable in cases under Industrial Disputes Act.

In a similar case in Civil Petition No. 1037 (ms) of 2004 the respondent no. 3 while rejecting the applications under Section 2-A of the U.P. industrial Disputes Act, 1947 has referred the judgment of the Apex Court in ***The Neldunegadi Bank Ltd. Vs. K.P. Mahadevan Kutti and others 2000 (84) FLR Page 673,*** where the facts were completely different and related to the dismissal of the service from the Bank and his appeal was dismissed, thereafter, an application was filed before the State Government under Section 10 of the Act. However, in the aforesaid judgment, the Apex Court has observed that law does not prescribe any time limit for the appropriate Government to exercise its powers under Section 10 of the Act, this power can be exercised at any point of time but it cannot be availed in order to revive the matter which had since been settled.

Further in paragraph 6 of the aforesaid judgment (supra), it has been stated that he availed his remedy of appeal under the rules governing his conditions of service. It could not be said that in the circumstances industrial dispute did arise or was even apprehended. In these circumstances, the Apex Court has observed that the appropriate Government cannot in a mechanical fashion make the reference of the alleged dispute terming as industrial dispute.

First submission of the learned counsel for the petitioner with regard to the delay is that the Assistant Labour Commissioner has no jurisdiction to adjudicate the dispute on the ground of delay and as such the order dated 7th February, 2003 passed by the Assistant Labour Commissioner respondent no. 3 is illegal while refusing to refer the dispute before the Labour Court.

So far as the first point is concerned, learned counsel for the petitioner has submitted that the functions of respondent

no. 3 are merely of an administrative nature and not of judicial nature and hence that question as to whether the workman ahs completed 240 days of continuous service or not is a matter of fact and has to be adjudicated by the Labour Court and has not to be dealt at the stage of conciliation proceedings. Apex Court in the case ***Ajaib Singh v. Sirhind Co-operative Marketing-com-Processing Service Society Ltd. and another [1999 (82) FLR 137]*** held that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay is raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay along. Even in a case where the delay is shown to be existing, the tribunal, labour Court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages.

On account of the admitted delay, the labour court ought to have appropriately moulded the relief by denying the appellant-workman some part of the back wages. The Apex Court has observed as under:-

"It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation act, 1963 are not applicable to the proceedings under the Act and that the reief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a

merely hypothetical defence. No reference to the labour could can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour Court or board, dealing with the cse can appropriately mould the relief by declining to grant back wages to the workman till the date he raised te demand regarding his illegal retrenchment/termination of dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent-management on the full bench judgment of the Punjab and Haryana High Court in Ram Chander Morya v. State of Haryana, is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases". However it went on further to say that " reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunal will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay. We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 37-C of the Act to be adjudicated. It is not the function of the Court to prescribed the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal view of the Judges presiding the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left

over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the courts/boards and tribunals under the Act."

The aforesaid analogy has further been followed in the case of ***Gurmail Singh Vs. Principal, Government College of Education and others [20000(84) FLR 920].*** The Apex Court has observed as under:-

"…..As laid down by this Court in the case of Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. and another (1996) 6 SCC 82, if the order of dismissal is challenged belatedly, the dispute would still continue for adjudication, the only question would be to deprive back wages for the period of delay in raising such a dispute if on merits it is to succeed."

The observations of the Apex Court in ***Telco Convoy Drivers Mazdoor Sangh and another vs. State of Bihar and others (1989) 3 SCC 271 are fully applicable.*** The same is quote below:-

"Applying the principle laid down by this Court in the above decisions, there can be no doubt that the government was not justified in deciding the dispute. Where, as I the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the government in exercise of its administrative function under section 10 (1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh case (1985) 2 SCC 103, there may be exceptional cases in which the state Government may, on a proper examination of the demand with a view to declining

reference and courts will always be vigilant whenever the government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and that to allow the government to do so would be to render Section 10 and Section 12(5) of the Act nugatory."

In ***Sharad Kumar v. Govt. of NCT of Delhi & Ors. JT 2002 (4) SC 49***, the Apex Court has observed that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5) of the Act. In ***Sharad Kumar vs. Govt of NCT of Delhi & Ors*** *(supra), the Hon'ble Supreme Court has relied upon the judgment in* ***M.P. Irrigation Karamchari Sangh v. State of M.P. and Others [1985 (2) SCC 103]*** as well as Bombay Union of Journalists v. State of Bombay [AIR 1964 SC 1617] and has held as under:-

"24. In ***M.P. Irrigation Karamchari Sangh v. State of M.P. and Others [1985 (2) SCC 103)*** *taking note of the decision in the case of Bombay Union of Journalists v. state of Bombay [AIR 1964 SC 1617], wherein it was held that appropriate government is precluded from considering 4even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5), or not, this Court held that the Court had made it clear in the same judgment that it was a province of the industrial tribunal to decide the disputed questions of facts. This Court made the following observations:*

"5.…..Therefore, while conceding a very limited jurisdiction to the state government to examine patent frivolousness of the demands, it is to be understood as a rule,

that adjudication of demands made by workmen should be left to the tribunal to decide. Section 10 permits appropriate government to determine whether dispute 'exists or is apprehended;' and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2) adjudication. When a reference is rejected on the specious plea that the government cannot bear the additional burden, it constitutes adjudication and thereby usurption of the power of a quasi judicial tribunal by an administrative authority namely, the appropriate government. In our opinion, the reasons given by the state government to decline reference are beyond the powers of the government under the relevant sections of the Industrial Disputes Act. What the state government has done in this case is not a prima facie examination of the merits of the question involved. To say that granting of dearness allowance equal to that of the employees of the central government would cost additional financial burden on the government is to make a unilateral decision without giving an opportunity to the workmen to rebut this Conclusion. This virtually amounts to a final adjudication of the demand itself. The demand can never be characterized as either perverse or frivolous. The conclusion so arrived at robs the employees of an opportunity to place evidence before the tribunal and to substantiate the reasonableness of the demand."

In ***Sapan Kumar Pandit Vs U.P. State Electricity Board & others reported in 2001 SC-SLR 658,*** the Apex Court has held as under:

> *"It is useful to refer to a three Judges Bench decision of this Court as it related to the scope of the very same provision i.e. Section 4-K of the U.P. Act. In M/s Western India Watch Co. Ltd. Vs the Western India Watch Co.*

Workers Union, AIR 1970 SC 1205, learned Judges made the following observations:

Therefore, the expression 'at any time', though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can 'at any time', i.e. even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression 'at any time' thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression 'at any time' in the context in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjourned or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence."

Further reliance has been placed on the Government Order dated 31st December, 1958 while rejecting the application under Section 2-A of the Industrial Disputes Act, where the matter requires reference of dispute to Conciliation Board. It provides that no such application shall ordinarily be entertained, if it is in respect of dispute raised after more than six months.

In a similar Civil Petition No. 1343 of 2004, in paragraph 8, it has been stated as under:-

"That the notification dated 31.12.1958 upon which respondent no. 3 has relied upon was enforceable only for the period of one year and has never been extended and as such was no more in existence on the appointed day, thus there was no question of its applicability on the State of Uttaranchal under Section 86 of the U.P. Reorganization Act 2000 and as such the impugned order deserved to be set aside on this score along."

In the counter affidavit the respondents have replied as under:-

"That the contents of para 2 of the writ petition as stated in the manner are not admitted and hence denied, whereas the actual facts regarding the main controversy involved inthis matter are such that according to records available in this department the petitioner has done 7+3/6 i.e. seven and half working days only ion the month of October, 1981 and thereafter the petitioner due to non availability of work had left the work at his own will and had gone away also as such under these circumstances as stated above no notice under section 6(N) of the Industrial Disputes Act, 1947 was required to be served upon the petitioner."

6. That the contents of para 5 of the writ petition as stated in the manner are not admitted and hence denied, whereas in fact the aforesaid respondent besides filing the objection against delay as well as regarding leaving of work by the petitioner at his own also filed some other legal objections and also stated therein that the petitioner has not worked more than 240 days in any Calendar year.

8. That the contents of para 7 of the writ petition as stated in the manner are not admitted and hence dened.

However, it is clearly submitted that the Deputy Labour Commissioner Haridwar after due consideration rejected the application of the petitioner treating it to be tenable vide his order dated 10/2/2003.

11. That the contents of para 10 of the writ petition are not admitted, as these are not tenable and hence denied. However, it is submitted that the Court can take into account of the long delay in filing the application when no sufficient cause is shown therein than it is open to Court to go into facts and to consider the main reason of long delay in filing the application i.e. the court can analyze the circumstances as occurred in filing the application after a along time and furthermore, it is to be added here that no concrete grounds were given in filing the said application after a long period of atleast 19 years as such that application filed under Section 2 (1) of the aforesaid Act was not proper to be allowed."

In view of the aforesaid legal proposition, the order-dated 07.02.2003 passed by the respondent no. 2 and order dated 0-5.07.2004 passed by the respondent no. 3 cannot be sustained and are hereby quashed. The respondent no. 3 is directed to consider the case of the petitioner in accordance with law.

Writ petition is accordingly allowed. There will be no order as to costs.

(Rajesh Tandon, J.)

Dated: 25.04.2006
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